

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CAROLYN DUNN LUKSZA & PATRICIA
 FOSER, individually and on behalf of others
 similarly situated,

Plaintiffs,

vs.

TJX COMPANIES, INC., d/b/a TJ MAXX,
 Defendant.

Case No.: 2:11-cv-01359-JCM-GWF

ORDER

Motion to Conditionally
 Certify Class (#8)

This matter comes before the Court on Plaintiffs' Motion for Conditional Certification (#8), filed on September 27, 2011; Response to Plaintiffs' Motion (#50), filed on March 29, 2012; and Plaintiffs' Reply (#58), filed on April 27, 2012. The Court conducted a hearing on this matter on June 7, 2012. This written order follows.

PROCEDURAL HISTORY AND BACKGROUND

On August 22, 2012, Plaintiffs filed a Complaint alleging violation of the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. ("FLSA") based on Defendant's failure to pay lawful wages to Plaintiffs, individually and to those similarly situated. *See* Complaint (#1), ¶ 1. On September 27, 2011, Plaintiffs filed this Motion to Conditionally Certify (#8) pursuant to 29 U.S.C §216(b), requesting the Court order (1) that other persons similarly situated to Plaintiffs be given notice of the pendency of this action and an opportunity to file written consents with this Court to join this action and (2) that the status of limitations be tolled for the period of time this motion is pending before the Court. At the time of the filing of the motion, three individuals had consented to join the suit: named Plaintiffs Carolyn Dunn Luksza and Patricia Foser and opt-in Plaintiff William Beauford.

1 On November 7, 2011, Plaintiffs filed a Supplement (#30), informing the Court that four
2 additional individuals had consented to join the litigation: Helen Alderman, Cheryl Bieber, Calvet
3 Howell and Patrice Wielandt. On November 18, 2011, parties stipulated to conduct phased
4 discovery. *See* Order #31. The Court approved the parties' phased discovery plan and ordered a
5 six month discovery period. *See* Order (#32).

6 On January 20, 2012, Defendant filed a Motion for Protective Order (#35), requesting the
7 Court limit the scope of the deposition testimony to the Las Vegas distribution center. On January
8 30, 2012, the Court granted in part Defendant's request and ordered that the 30(b)(6) deposition
9 testimony be limited to the Las Vegas distribution center, but further ordered that Plaintiffs are not
10 precluded from inquiring whether certain matters are established or governed by a nationwide
11 policy, procedure or practice. *See* Minute of Proceedings (#44).

12 Between the filing of the initial motion and Defendant's Response, the parties conducted a
13 significant amount of discovery over a period of four months. Defendant deposed all seven named
14 and opt-in Plaintiffs; Plaintiffs conducted four Rule 30(b)(6) depositions of Defendant's corporate
15 representatives; both parties have served and responded to several written discovery requests;
16 nearly 5,000 pages of documents have been produced; and Defendant has collected sworn
17 declarations from 20 Shift Supervisors at the Las Vegas distribution centers. On March 29, 2012,
18 Defendants filed their Response (#50). Upon the parties' request, the Court stayed all discovery in
19 this matter pending decision on this motion. *See* Order (#55). Plaintiff's Reply (#58) was filed on
20 April 27, 2012.

21 **I. TJX's Structure**

22 Defendant TJX is a discount retailer of apparel and home fashion that operates T.J. Maxx
23 and Marshalls stores across the United States. TJX operates nine distribution centers across the
24 country that support the delivery of goods to the retail stores. The Las Vegas distribution center is
25 the only center that serves both TJ Maxx and Marshalls stores ("MarMaxx"). The organization of
26 the distribution centers, from the top down, includes general manager ("GM"), assistant general
27 managers ("AGMs"), Area Operations Managers ("AOMs"), Shift Supervisors, and associates.
28 Associates are employees who are assigned to a particular time-based shift within a specific

1 department. The associates are supervised by Shift Supervisors, who manage a particular
2 department for a particular shift. The AOMs oversee several different departments within one
3 distribution center and supervise the work of the Shift Supervisors. AOMs report to one of several
4 AGMs, who in turn report to the distribution center's GM.

5 **II. Shift Supervisors**

6 TJX employs approximately 70 Shift Supervisors in the Las Vegas distribution center. *See*
7 MacDonald Depo. 12:23-24. The Shift Supervisor's job summary contained in the D/C Supervisor
8 Exempt Job Description states

9 Total responsibility for operating an efficient, productive and safe
10 department, while meeting or exceeding daily production
11 requirements within the Distribution Center. Ensures that quality and
12 services are at a high level. Maintains a productive, positive, and
motivated work force by spending a minimum of 90% of the total
shift "on the floor" reviewing orders and directing associates.

13 *See* Plaintiff's Reply (#58, 59), Master Exhibit 8.

14 The job summary is further explained by a list of duties and responsibilities that each Shift
15 Supervisor should perform. These duties and responsibilities include managing the day-to-day
16 activity within the department, including planning, flow, and resource allocation by ensuring
17 appropriate staffing levels, monitoring each associate's progress, work methods, behavior and pace
18 and providing feedback. *Id.* Further, Shift Supervisors are responsible for developing and
19 motivating associates, building effective relationships with business partners, effectively
20 communicating with associates and management and ensuring constant improvement by reviewing
21 practices, methods and processes among others. *Id.* Defendant's Vice President and General
22 Counsel Jennifer Brady indicated this job description is used at all TJX distribution centers and has
23 not changed since at least October 31, 2006. *See* Plaintiff's Reply (#59), Exhibit 2, Brady Depo.
24 35: 2-18.

25 The named and opt-in Plaintiffs' deposition testimony further support that the D/C
26 Supervisor Exempt Job Description accurately describes the duties and responsibilities of a Shift
27 Supervisor. During their deposition, named-Plaintiffs Luksza and Foser and opt-in Plaintiffs
28 Bieber, Weilandt, Alderman and Howell stated that the duties and responsibilities contained in the

1 Defendant's job description accurately describe the duties they perform as Shift Supervisors. *See*
 2 Luksza Depo. at 122:13-16; Foser Depo. at 218:6-219:3; Bieber Depo. 91:16 - 92:20; Weilandt
 3 Depo. at 178:23-179:1; Alderman Depo. at 79:11-80:4; and. Howell Depo. at 125:23-126:7.¹
 4 Further, opt-in Plaintiff Beauford agreed that, in his capacity as a Shift Supervisor, he spends the
 5 majority of his time every day "directing the work of associates, providing coaching and counseling
 6 to the extent they require it, and generally directing the flow of work through your department."
 7 Beauford Depo. at 116:9-16. Plaintiffs understanding of the job description appears consistent with
 8 the duties and responsibilities contained in the D/C Supervisor Job Description in Master Exhibit 8.

9 **III. Plaintiffs' Allegations**

10 Plaintiffs allege that Defendant mis-classified them, and potentially hundreds of other Shift
 11 Supervisors employed at nine different TJX and MarMaxx distribution centers across the country,
 12 as exempt from the overtime requirement of the FLSA. Plaintiffs allege that Shift Supervisors are
 13 classified as exempt even though they do not perform the type of work that warrants an exempt
 14 classification. Plaintiffs further allege that the Engineered Standards are a company-wide
 15 "common policy" that binds the class of Plaintiffs together and requires Shift Supervisors to
 16 conform to more oversight and regulation from immediate supervisors than in the past and to work
 17 additional uncompensated hours.

18 The named and opt-in Plaintiffs submitted declarations alleging that they were classified as
 19 exempt employees and worked in excess of 40 hours per week without compensation. *See*
 20 *generally* Plaintiffs' Motion (#8), Exhibits 1-3 and Supplement (#30), Exhibits 11-13.² Plaintiffs
 21 allege that the Engineered Standards require all Shift Supervisors to follow a strict regimen, which
 22 removes any independent decision making or personal judgment. *Id.* Plaintiffs also allege that
 23 after implementation of the Engineered Standards, Shift Supervisors lack any real authority to
 24 discipline associates. *Id.* The declarations also state that the Engineered Standards are common to
 25

26 ¹ The Court further notes that Master Exhibit 8 provides a percentage of time that the job requires for each
 27 duty and responsibility identified. The named and opt-in Plaintiffs did not agree or were not asked if the percentages
 28 identified on Master Exhibit 8 were accurate. *See* Reply (#58, 59), Master Exhibit 8.

² It does not appear that opt-in Plaintiff Calvet Howell submitted a declaration.

1 all Shift Supervisors across the country, and therefore there are other similarly situated, current and
2 former Shift Supervisors at the nine distribution centers. *Id.* Plaintiffs therefore argue that the
3 Engineered Standards do not permit Shift Supervisors to act in any manner that would justify a
4 classification of exempt from overtime under the FLSA.

5 Plaintiffs deposed four different corporate representatives, Jennifer Brady, Barry Honeycutt,
6 Avery McDonald and Christopher Walker, on nine different topic areas. Plaintiffs point to Jennifer
7 Brady's deposition testimony to support their assertion that all Shift Supervisors are similarly
8 situated. Brady stated "supervisors responsibilities are the same at MarMaxx facilities as compared
9 to other TJX facilities," and "employment positions are Las Vegas-based facility" are "typically"
10 the "same." Brady Depo. at 35:1-20 and 15:1-4. Plaintiffs further sought testimony and
11 information on the Engineered Standards and how they apply to various employees. Plaintiffs
12 submitted TJX documents that indicate that the Engineered Standards have been implemented in
13 some form at every TJX distribution center. *See* Master Exhibit 135. Mr. Honeycutt was
14 designated as the corporate representative to discuss the Engineered Standards. Mr. Honeycutt
15 testified that Engineered Standards "provides [a] non-biased means of evaluat[ing] [an] associate,
16 department, shift and building, etc." Honeycutt Depo., at 78:9-79:7. Plaintiffs further point to TJX
17 documents that indicate that the Engineered Standards have increased supervisor's hours and added
18 several additional layers to the decision-making process. *See* Master Ex. 123.

19 Plaintiffs argue that the deposition testimony of TJX's corporate representatives and the
20 documents obtained through discovery supports the allegations Plaintiffs made in their
21 declarations. Plaintiffs conclude that certification under the lenient first phase standard "is
22 inevitable based on the facts before this Court" because Plaintiffs have made the required modest
23 factual showing that Plaintiffs were victims of a common policy or plan that violated the law. *See*
24 Plaintiffs' Reply (#58) at 23.

25 **IV. Defendant's Allegations**

26 Defendant argues that certification is improper. Initially, Defendant argues that because
27 extensive discovery has taken place, the Court should proceed to the second step analysis described
28 hereafter, and apply a heightened standard for determining whether certification of the class is

1 proper. Defendant maintains, however, that under either standard, certification should be denied.

2 Defendant argues that Plaintiffs have failed to show that they are similarly situated.
3 Defendant claims that the Engineered Standards are not a common policy that bind the class
4 members together, but rather the Engineered Standards are uniquely applied to each department at
5 the distribution centers and are therefore not “common” to any of the Plaintiffs. Defendant
6 maintains that Plaintiffs have not met their burden because the only reliable evidence before the
7 Court demonstrates that the Engineered Standards are tailored to each department based on various
8 discrete characteristics. Defendant claims that the unique application of the Engineered Standards
9 would require the Court to make highly individualized inquiries into the duties that were actually
10 performed by each of the Plaintiffs.

11 Even assuming the Court finds that the Engineered Standards apply uniformly to all
12 Plaintiffs, Defendant argues that the evidence before the Court does not support that the application
13 of the Engineered Standards are either per se unlawful or unlawful as applied. Defendant contends
14 that the declarations submitted by Plaintiffs are not based on personal knowledge and are
15 contradicted by their deposition testimony. Plaintiffs’ declarations generally allege that Plaintiffs
16 were told exactly what to do by the AOMs, lacked decision-making power, lacked authority to
17 discipline associates and lacked discretion to deviate from the tasks assigned to them. *See*
18 *generally* Plaintiff’s Declarations at Plaintiffs’ Motion (#8), Exhibits 1-3 and Supplement (#30),
19 Exhibits 11-13. Defendant points out that Plaintiffs each agreed at their depositions that the D/C
20 Supervisor Job Description accurately reflects their duties and responsibilities as Shift Supervisors.
21 *See* Defendant’s Opposition (#51), Plaintiffs’ Depo. at Exhibits 7-13. Defendants further claim that
22 Plaintiffs testified that they perform a wide range of exempt/managerial duties including planning,
23 assigning and directing associates, making decisions on staffing levels within their departments,
24 training, coaching and evaluating associates, exercising discretion to assign “coach trainers” to
25 associates, initiating and escalating disciplinary action against associates and making
26 recommendations for discipline or termination among other tasks. *Id.*

27 Named-Plaintiff Luksza admitted during her deposition that she does not perform the same
28 tasks as associates, that she is responsible for coordinating associate assignments in work areas,

1 checking the work of associates in her areas, monitoring associate progress, providing feedback to
2 associates, developing associates, nominating associates for associate of the month and
3 disciplining associates. Luksza Depo. 118 and 151-152. She further stated that she exercised her
4 discretion to assign a coach trainer to certain associates. *Id.* at 102. Defendant argues these
5 statements are in direct contradiction to her declaration stating that “all front Line Shift Supervisors
6 [are] told exactly what tasks to do, when to do those tasks, and how to perform these tasks.”
7 Lukzsa Decl. ¶ 9.

8 Further opt-in Plaintiff Beauford indicated in his declaration that he “never had any
9 disciplinary authority.” Beauford Decl. ¶ 8. Defendants argue that Mr. Beauford’s deposition
10 testimony is in direct contradiction to that statement. Mr. Beauford indicated in his deposition that
11 he does take disciplinary action against associates including issuing verbal and written warnings
12 and deciding whether to further escalate disciplinary action when prior disciplinary actions are
13 unsuccessful. Beauford Depo. 129-130.

14 Defendant points to opt-in Plaintiffs Bieber and Alderman’s deposition testimony to further
15 illustrate that Plaintiffs’ declarations contain false statements. Plaintiff Bieber admitted at her
16 deposition that the following statements in her declaration were false: that she and other Shift
17 Supervisors lacked any decision-making power and that “all Shift Supervisors were told exactly
18 what tasks to do, when to do those tasks, and how to perform those tasks.” Bieber Depo. 218:5-8
19 and 219:2-14. Contrary to her declaration, Ms. Bieber further indicated that she had no personal
20 knowledge of the impact of the Engineered Standards on other Shift Supervisors in Las Vegas or
21 around the country. Bieber Depo. 222.

22 Defendant further highlights Plaintiff Alderman’s deposition testimony where she stated
23 that she had authority to discipline associates, which is contrary to her declaration statement
24 indicating that “I never had any disciplinary authority.” Alderman Depo. 206:2-5. Plaintiff
25 Alderman additionally stated that her declaration statement indicating that she never had any ability
26 to deviate from the tasks assigned by the AOMs was incorrect and that, in fact, she had flexibility
27 to perform her job. Alderman Depo. 206:6-13. Defendant points to several other perceived
28 inconsistencies between Plaintiffs’ declarations and deposition testimony in arguing that

1 certification is improper.

2 To further rebut Plaintiffs' original declarations, Defendant submitted declarations from 20
3 Shift Supervisors who state that they perform a variety of exempt duties as Shift Supervisors
4 (collectively known as "Defendant's declarations"). Alternatively, Defendant argues that if the
5 Court were inclined to grant certification, that certification should be limited to the Las Vegas
6 distribution center because Plaintiffs have failed to allege any sufficient evidence that Shift
7 Supervisors outside the Las Vegas area are similarly situated.

8 DISCUSSION

9 **A. FLSA**

10 Congress' principal purpose in enacting the FLSA was to protect all covered workers from
11 substandard wages and oppressive working hours. *Barrentine v. Arkansas–Best Freight Sys., Inc.*,
12 450 U.S. 728, 739 (1981). The FLSA was created to provide a uniform national policy of
13 guaranteeing compensation for all work or employment covered by the Act. *Id.* at 741. The FLSA
14 grants individual employees broad access to the courts and permits an action to recover minimum
15 wages, overtime compensation, liquidated damages, or injunctive relief. *Id.* at 740. Under the
16 FLSA, an employee may initiate a class action on behalf of himself or herself and other similarly
17 situated people. 29 U.S.C. § 216(b). Court-supervised notice of pendency of § 216(b) actions
18 "serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to
19 expedite disposition of the action." *Hoffman–La Roche, Inc. v. Sperling*, 493 U.S. 165, 172 (1989).
20 The clear weight of authority holds that the requirements for class action certification under
21 Fed.R.Civ.P. 23(a) do not apply to claims arising under the FLSA. *Wang v. Chinese Daily News,*
22 *Inc.*, 623 F.3d 743, 761 (9th Cir.2010) (citing *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th
23 Cir.1977), overruled on other grounds by *Hoffman–La Roche, Inc. v. Sperling*, 493 U.S. at 167, n.
24 1).

25 Under § 216(b) actions, although a plaintiff may bring an action on behalf of himself and
26 others similarly situated, "no employee shall be a party to any such action unless he gives his
27 consent in writing to become such a party and such consent is filed with the court in which such
28 action is brought." 29 U.S.C. § 216(b). This is commonly referred to as the "opt-in" provision.

1 District courts have the discretion to implement § 216(b) by facilitating notice to potential
2 plaintiffs. *Id.* at 169. Although certification under the FLSA is not required, “certification in a §
3 216(b) collective action is an effective case management tool, allowing the court to control the
4 notice procedure, the definition of the class, the cut-off date for opting-in, and the orderly joinder of
5 the parties.” *Edwards v. City of Long Beach*, 467 F.Supp.2d 986, 989 (C.D.Cal. 2006).

6 Although the FLSA does not define the term “collective action,” the Ninth Circuit has held
7 that a collective action is “an action brought by an employee or employees for and on behalf of
8 himself or themselves and other employees similarly situated.” *Gray v. Swanney–McDonald, Inc.*,
9 436 F.2d 652, 655 (9th Cir. 1971) (quoting H.R.Rep. No. 326, 80th Cong., 1st Sess. at 14)
10 (internal quotations omitted). If the court finds the named plaintiffs have established that they are
11 “similarly situated,” the court may, in its discretion, authorize the named § 216(b) plaintiffs to send
12 notice to all of the potential plaintiffs and may set a deadline for those plaintiffs to “opt-in” to the
13 suit. *Edwards*, 467 F.Supp.2d at 989.

14 **B. The Similarly Situated Requirement**

15 The court must preliminarily determine whether the potential plaintiffs are “similarly
16 situated” to create an opt-in class under § 216(b). *See Grayson v. K–Mart Corp.*, 79 F.3d 1086,
17 1097 (11th Cir. 1996). A named plaintiff seeking to create a § 216(b) opt-in class must sue on
18 behalf of himself or herself and other “similarly situated” employees. Named plaintiffs seeking to
19 create a § 216(b) opt-in class need only show that their positions are similar, but not identical to,
20 the positions held by putative class members. *Id.* (quoting *Sperling v. Hoffman–La Roche, Inc.*,
21 118 F.R.D. 392, 407 (D.N.J.1988)). The similarly situated requirement of § 216(b) “is more
22 elastic and less stringent” than the joinder and severance requirements found in Rule 20 and Rule
23 42 respectively of the Federal Rules of Civil Procedure. *Id.* at 1095.

24 The FLSA does not define the term “similarly situated,” and the Ninth Circuit has not yet
25 formulated a test for courts to determine whether putative class members are “similarly situated.”
26 A number of courts, including this one, have adopted a two-step approach for determining whether
27 potential plaintiffs are “similarly situated” for purposes of conditional class certification under §
28 216(b). *See Fetrow-Fix v. Harrah's Entertainment, Inc.*, 2011 WL 6938594 (D. Nev. 2011) and

1 *Hinojos v. Home Depot*, 2006 WL 3712944 (D. Nev. 2006). The two-step approach involves
2 notification to potential class members of the representative action followed by a final “similarly
3 situated” determination after discovery is completed. At the first, or “notice stage,” the court relies
4 “primarily on the pleadings and any affidavits submitted by the parties” [to decide] “whether the
5 potential class should be given notice of the action.” *Leuthold v. Destination America, Inc.*, 224
6 F.R.D. 462, 466 (N.D. Cal. 2004). A fairly lenient standard usually applies at the initial stage of a
7 collective action case because the court has “minimal evidence” to make its determination.
8 *Mooney v. Aramco Services, Co.*, 54 F.3d 1207, 1213–14 (5th Cir. 1995), overruled on other
9 grounds by *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 90–91 (2003); *Kane v. Gage*, 138 F.Supp.2d
10 212, 214 (D. Mass. 2001). At the initial notice stage, a plaintiff need only make substantial
11 allegations that the putative class members were subject to a single decision, policy or plan that
12 violated the law. *Mooney, Id.* at 1214 n. 8. The majority of courts have adopted this two-step
13 approach. *Leuthold*, 224 F.R.D. at 466.

14 If the court conditionally certifies a class under § 216(b) and authorizes notice to putative
15 class members, the parties conduct discovery, and once discovery is completed, the party opposing
16 class certification may move to decertify the class. *Id.* at 467. In determining whether to certify or
17 decertify the conditionally certified class, the court makes “a factual determination regarding the
18 propriety and scope of the class.” *Id.* Factors the court considers in making its factual
19 determination include “(1) the disparate factual and employment settings of the individual
20 plaintiffs; (2) the various defenses available to the defendants with respect to the individual
21 plaintiffs; and (3) fairness and procedural considerations.” *Id.* This determination is made after
22 discovery is completed, so that the court has a complete factual record on which to base its decision
23 whether the plaintiffs are similarly situated. If the plaintiffs are not similarly situated, “then the
24 court may decertify the class and dismiss the opt-in plaintiffs without prejudice.” *Id.*

25 **I. Applicable Standard**

26 Both parties agree that the two-step approach should be used by this Court in determining
27 whether to grant Plaintiffs conditional certification. The parties however dispute what step and
28 what standard the Court should apply at this time. Plaintiffs argue the Court should base its

1 analysis under the lenient standard of the first step, or the “notice stage,” because although some
2 discovery has taken place, there is still considerable discovery that needs to take place before the
3 Court can properly apply the second step analysis. Defendant however argues the Court should
4 skip the first step and base its analysis under the standards of the second step, or “final stage,”
5 because considerable discovery has occurred and an ample factual record has been established.

6 When conditional certification is sought early in the action before discovery has taken
7 place, the determination is made using a fairly lenient standard based “only on the pleadings and
8 any affidavits which have been submitted.” *Mooney*, 54 F.3d at 1213-14. However, where the
9 parties have had an opportunity to conduct pre-certification discovery, courts tend to hold plaintiffs
10 to a higher standard of proof. *See, e.g., Olivo v. GMAC Mortg. Corp.*, 374 F.Supp.2d 545, 548
11 (E.D. Mich. 2004) (requiring “modest” factual support for class allegations where discovery had
12 been allowed on the issue of collective action certification); *Thiessen v. Gen. Elec. Capital Corp.*,
13 996 F.Supp. 1071, 1081 (D. Kan. 1998) (adopting an “intermediate” approach in analyzing the
14 “similarly situated” issue where the parties had engaged in three months of discovery); *Ray v. Motel*
15 *6 Operating, L.P.*, 1996 WL 938231 at 4 (D. Minn. 1996) (declining to apply lenient standard at the
16 notice stage because the facts before the Court are extensive); *see also Hinojos v. Home Depot*,
17 2006 WL 3712944 (D. Nev. 2006) (applying second step analysis, noting that it was clear that the
18 named plaintiffs were not similarly situated, and that the action would not be manageable).

19 In *Bouaphakeo v. Tyson Foods, Inc.*, 564 F.Supp.2d 870, 893 (N.D. Iowa 2008), the court
20 further examined the two-step process and noted that

21 the level of proof required at each stage in the FLSA collective action
22 certification process is largely dependent upon the amount of
23 information before the court. At the first step, when less information
24 is before the court, plaintiffs simply need to come forward with a
25 “factual basis,” *Dietrich*, 230 F.R.D. at 577, a “colorable basis,”
26 Smith, 404 F.Supp.2d at 1149, or “substantial allegations,” that the
27 existing plaintiffs and putative plaintiffs “were together the victims
28 of a single decision, policy or plan,” *Davis*, 408 F.Supp.2d at 815. At
the second step, the court has much more information and is in a
position to “make a factual determination on the similarly situated
question,” *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th
Cir.1995), and therefore “plaintiffs must clear a higher hurdle to
continue,” *Frank*, 2007 WL 2780504, at *3.

...

1 Although the court in *Tyson* found it proper to proceed with the first step analysis, the court
2 stated that “it cannot overlook the almost six months of substantial class discovery that the parties
3 have conducted and the valuable information before the court that is relevant to the certification of
4 Plaintiffs’ collective action under the FLSA.” *Id.* at 895. The *Tyson* court therefore adopted what
5 courts have labeled an “intermediate approach.” Essentially, where the parties have conducted
6 discovery, courts will consider all the evidence before it and apply a heightened standard in making
7 a determination of conditional certification. *See Villanueva-Bazaldua v. TruGreen Ltd. Partners*,
8 479 F.Supp.2d 411, 415 (D.Del. 2007) (“District courts in other circuits have adopted an
9 intermediate approach to the ‘similarly situated’ inquiry when the parties voluntarily engage in
10 discovery prior to a decision on conditional certification.”); *Jimenez v. Lakeside Pin-nPac, LLC*,
11 2007 WL 4454295, at *3 (W.D. Mich, 2007) (stating, because the parties had engaged in six
12 months of pre-certification discovery, that “the Court will review Plaintiffs’ allegations and
13 affidavits in conjunction with the evidence gleaned through discovery”).

14 Here, the parties have had four months to engage in pre-certification discovery. *See*
15 Scheduling Order (#32). Over those four months, all seven named and opt-in Plaintiffs have been
16 deposed; four Rule 30(b)(6) depositions of Defendant’s corporate representatives have been
17 conducted; several discovery requests have been served and responded to, resulting in the
18 production of nearly 5,000 pages of documents; and sworn declarations from 20 other Shift
19 Supervisors at the Las Vegas distribution centers have been collected. Accordingly, in determining
20 whether Plaintiffs have met their burden of showing that they are “similarly situated” to the
21 putative class members, the Court will review Plaintiffs’ allegations and affidavits in conjunction
22 with the evidence obtained through discovery and apply a heightened standard. Although it is not
23 the role of the Court at this stage of the proceedings to decide the case on the merits, *White v. MPW*
24 *Indus. Servs., Inc.*, 236 F.R.D. 363, 368 (E.D. Tenn. 2006), the Court has “a responsibility to assure
25 that there is some factual basis for plaintiffs’ claims of class-wide discrimination before judicial
26 approval of the sending of notice is granted.” *Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264,
27 267 (D.Minn. 1991).

28 . . .

1 Application of the intermediate standard is consistent with this district's prior decisions in
2 *Fetrow-Fix v. Harrah* and *Hinijos v. Home Depot*. In *Fetrow-Fix*, plaintiffs sought class
3 certification based on allegations that the defendants failed to pay non-exempt hourly employees
4 straight time and overtime compensation for mandatory attendance at pre-shift meetings. 2011 WL
5 6938594, *1. The parties conducted extensive discovery prior to bringing the issue of conditional
6 certification before the court. *Id.* In response to plaintiffs' arguments that the Court should not
7 evaluate factual disputes, credibility or merits of the claims at the first stage, the court noted,

8 Given the extent of the discovery that has been conducted by the
9 Plaintiffs, the court will not consider the evidence in the record
10 supporting the Plaintiffs' claims they are similarly situated to the
11 putative class, while ignoring the discovery suggesting they are not.
12 Having reviewed the voluminous moving and responsive papers and
13 attached deposition transcripts, declarations and other exhibits, the
14 court is simply not persuaded that the Plaintiffs have established that
15 putative class members were subjected to a common decision, policy
16 or plan that violated the FLSA. For these reasons the court concludes
17 that it would not serve the interests of judicial economy to attempt to
18 resolve the potential claims of a putative class consisting of 85,000
19 employees in 35 separate properties nationwide in this action. The
20 court will therefore deny the motion to conditionally certify a
21 collective action.

22 *Id.* at *8.

23 In *Hinojos v. Home Depot*, plaintiffs alleged unpaid overtime under the FLSA. 2006 WL
24 3712944. After extensive discovery took place, the Court stated that "there is a sufficient
25 evidentiary record to determine whether this action can be managed on a collective basis." *Id.* at
26 *2. The Court applied a heightened standard and found that it was clear that the plaintiffs were not
27 similarly situated and the proposed class would not be manageable. *Id.*

28 In applying the heightened standard here, the Court concludes that the evidence provided by
Plaintiffs is insufficient to warrant conditional certification of the putative class. Plaintiffs through
their declarations and Complaint allege that the Engineered Standards deprive them of exercising
managerial discretion such that their classification as exempt employees under the FLSA is
improper. Even assuming that the Engineered Standards are "common" to all Shift Supervisors in
each department, Plaintiffs by their own testimony have failed to make an adequate showing that
the Engineered Standards are a common policy that deprives this potential class of Shift
Supervisors of their discretionary authority.

1 The evidence before the Court does not demonstrate that the Engineered Standards strip
2 Plaintiffs of their managerial responsibilities such that it binds the putative class together. In
3 particular, the Court is concerned about the contradictions between Plaintiffs' declarations and their
4 deposition testimony. Each of Plaintiffs' deposition testimony appears to contradict the relevant
5 portions of their declarations and the allegations in the Complaint (#1). Further, Plaintiffs
6 Alderman and Bieber admitted during their depositions that several portions of their declaration
7 were incorrect, and Plaintiff Alderman agreed to the extent that her deposition differs from her
8 declaration, her deposition testimony was correct. Alderman Depo. 215:8-16.

9 Each named and opt-in Plaintiff further indicated during their deposition that their primary
10 duties as Shift Supervisors include among other things directing and evaluating their associates and
11 managing the flow of goods in their department. During the depositions, the named and opt-in
12 Plaintiffs further admitted that the D/C Supervisor Job Description generally reflected their duties
13 and responsibilities as Shift Supervisors. *See* Master Exhibit 8 and Beauford Depo. at 116:9-16;
14 Luksza Depo. at 122:13-16; Foser Depo. at 218:6-219:3; Bieber Depo. 91:16 - 92:20; Weilandt
15 Depo. at 178:23-179:1; Alderman Depo. at 79:11-80:4; and. Howell Depo. at 125:23-126:7. The
16 types of duties and responsibilities set forth in this Job Description along with the types of tasks
17 Plaintiffs testified they perform, appear to be consistent with the regulation governing exemption
18 from the overtime requirement of the FLSA. *See generally* 29 C.F.R. § 541.100(a)(2).³

19 To further support that Engineered Standards are not a common policy that strip Plaintiffs
20 of their managerial/exempt duties, Defendant has offered sworn declarations from 20 other Shift
21 Supervisors from the Las Vegas distribution centers indicating that they exercise personal judgment
22 and regularly perform managerial duties. *See* Defendant's Response, Exhibits 14-33. Plaintiffs
23 classify Defendant's declarations as "happy camper" declarations and argue that Plaintiffs have not
24 had an opportunity to depose those individuals. Because the declarations of Shift Supervisors
25 submitted by Defendant are consistent with and support the named and opt-in Plaintiffs' deposition

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27 ³ In order to fall under the executive, administrative, or combination exemptions to FLSA's overtime
28 protections, an employee's primary duty must be managerial or administrative, or a combination of the two. *See generally* 29 C.F.R. § 541.

1 testimony, the Court finds they are probative on the issue of the actual duties of Shift Supervisors.

2 It appears Plaintiffs would have the Court ignore the apparent contradiction between
3 Plaintiffs' depositions and declarations. Plaintiffs did not address the alleged contradictions in its
4 Reply, but to state in a footnote that at the "first stage analysis, however the court does not 'weigh
5 the evidence.'" Reply (#58) at 3. Although under the traditional first stage analysis Plaintiffs are
6 correct, this Court will not consider the evidence in the record supporting the Plaintiffs' claims they
7 are victims of a common policy or plan that violates the FLSA, while ignoring the discovery
8 suggesting they are not. *See Fetrow-Fix*, 2011 WL 6938594 at *8. The Court finds that Plaintiffs
9 have failed to show that the Engineered Standards are a common policy that deprives Shift
10 Supervisors of exercising their discretion and binds the Plaintiffs and the proposed putative class
11 members together. Therefore, certification of Plaintiffs' proposed class is not warranted.

12 **CONCLUSION**

13 Having reviewed the voluminous moving and responding papers and attached deposition
14 transcripts, declarations and other exhibits, the Court is simply not persuaded that Plaintiffs have
15 established that the putative class members were subjected to a common decision, policy or plan
16 that violated the FLSA. The Court therefore concludes that it would not serve the interests of
17 judicial economy to conditionally certify this collective action. Accordingly,

18 **IT IS HEREBY ORDERED** that Plaintiffs' Motion for Conditional Certification (#8) is
19 **denied.**

20 DATED this 8th day of August, 2012.

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22 
23 GEORGE FOLEY, JR.
24 United States Magistrate Judge
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